9 FAM 40.92
NOTES

(CT:VISA-2007; 07-05-2013)
(Office of Origin: CA/VO/L/R)

9 FAM 40.92 N1 INTERPRETATION OF "UNLAWFUL PRESENCE"

(CT:VISA-1741; 10-13-2011)

a. INA 212(a)(9)(B)(ii) (8 U.S.C. 1182(a)(9)(B)(ii)) provides the following construction for the term "unlawful presence": "… the alien is present in the United States after the expiration of the period of stay authorized by the [Secretary of Homeland Security] or is present in the United States without being admitted or paroled." Under this construction, an alien would generally be unlawfully present if he or she entered the United States without inspection, or stayed beyond the date specified on the Form I-94, Arrival and Departure Record, or was found by the Department of Homeland Security (DHS) or an immigration judge or the Board of Immigration Appeals (BIA) to have violated status. However, even aliens fitting into one of these categories may be deemed to be in a period of authorized stay in certain circumstances, as noted below.

b. DHS has interpreted "period of stay authorized by the Secretary of Homeland Security" as used in the construction of unlawful presence in INA 212(a)(9)(B)(ii) to include:

(1) For aliens inspected and admitted or paroled until a date specified on the Form I-94 or any extension, any period of presence in the United States up until either:

(a) The expiration of the Form I-94 (or any extension); or

(b) A formal finding of a status violation made by DHS or an immigration judge or the BIA in the context of an application for an immigration benefit or in removal proceedings, whichever comes first.

(2) For aliens inspected and admitted for "duration of status" (DOS), any period of presence in the United States, unless DHS or an immigration judge or the BIA makes a formal finding of a status violation, in which case unlawful presence will only begin to accrue as of the date of the formal finding;

(3) For aliens granted "voluntary departure" (VD), pursuant to INA 240B, the period of time between the granting of VD and the date for their departure,

if the alien departs according to the terms of the grant of VD;

(4) For aliens who have applied for extension of stay or change of nonimmigrant classification and who have remained in the United States after expiration of the Form I-94 while awaiting DHS's decision, the entire period of the pendency of the application, provided that:

(a) The alien does not work unlawfully while the application is pending and did not unlawfully prior filing the application; and

(b) The alien did not otherwise fail to maintain his or her status prior to the filing of the application (unless the application is approved at the discretion of USCIS and the failure to maintain status is solely a result of the expiration of the Form I-94), and further provided either:

(i) That the application was subsequently approved; or

(ii) If the application was denied or the alien departed while the application was still pending, that the application was timely filed and nonfrivolous, and the alien did not work without authorization prior to or during the pendency of the application. (See 9 FAM 40.92 N5 below.)

(5) For aliens who have properly filed an application for adjustment of status to that of a lawful permanent resident (LPR), the entire period of the pendency of the application, even if the application is subsequently denied or abandoned, provided the alien (unless seeking to adjust status under NACARA or HRIFA) did not file for adjustment "defensively" (i.e., after deportation proceedings had already been initiated);

(6) For aliens covered by Temporary Protected Status (TPS), the period after TPS went into effect and prior to its expiration; and

(7) For aliens granted deferred action, the period during which deferred action is authorized.

(The foregoing above list is not exhaustive.)

c. You should note that any unauthorized presence accrued prior to the filing of an application for adjustment of status, or the granting of voluntary departure, or the date a prima facie TPS application is filed (if the application is approved) is not "cured" by the subsequent period of authorized stay that these events trigger, and additional unauthorized presence will resume accruing after these authorized periods lapse.

d. For persons who have been admitted for duration of status (DOS) (as is usually the case with aliens in A, G, F, J, and I visa status), unlawful presence will not accrue unless an immigration officer or immigration judge (IJ) or the BIA finds a status violation in the context of a request for an immigration benefit or a deportation proceeding in removal proceedings. Therefore, your belief that an alien violated his or her status in the United States is not, in itself, sufficient for an INA 212(a)(9)(B) finding, unless the alien entered without having been

inspected and admitted or stayed beyond the Form I-94 specified date. Otherwise, only a finding of violation of status by the DHS or an IJ or the BIA can cause a period of "unlawful presence" to begin.

e. A finding of status violation by DHS or an IJ or the BIA is not required in the case of an illegal entrant or an alien who overstays the date specified on the Form I-94. If you find that an alien entered without inspection and admission or stayed beyond the date on the Form I-94, and remained in the United States more than 180 days after entering without admission or after the expiration of his or her Form I-94, a determination of inadmissibility under INA 212(a)(9)(B) would be warranted (unless some exception to INA 212(a)(9)(B) applies in the particular case).

f. When calculating unlawful presence, the date that the Form I-94 (or any extension) expires is considered authorized and is not counted. In addition, the date of departure from the United States is not counted as unlawful presence. In duration of status cases where DHS or an IJ or the BIA makes a formal status violation finding, the alien begins accruing unlawful presence on the date of the finding (i.e., the date the finding was published/communicated). For example, if an applicant presents a letter from DHS dated December 1, 2008, that says the applicant was out of status starting on May 28, 2001, the applicant began to accrue unlawful presence as of December 1, 2008, not May 28, 2001. Note that, in the event that an IJ made the status violation finding and concurrently issued a voluntary departure order, no unlawful presence would accrue if the applicant complied with the order by making a timely departure.

9 FAM 40.92 N2 INADMISSIBILITY UNDER INA 212(A)(9)(B)

(CT:VISA-1741; 10-13-2011)

a. INA 212(a)(9)(B) went into effect on April 1, 1997, and the statute is not retroactive. Periods in illegal status prior to April 1, 1997, therefore, cannot be considered when calculating the period of unlawful presence accrued for purposes of 212(a)(9)(B)(i).

b. Neither of the INA 212(a)(9)(B)(i)(I) (180+ days but less than a year) or INA 212(a)(9)(B)(i)(II) (one year+) time frames is cumulative. The unlawful presence must occur in the same trip to the United States, and periods of unlawful presence accrued on separate trips cannot be added together. However, separate periods of unlawful presence occurring during the same overall period of stay (e.g., unlawful presence before and after a period of voluntary departure) should be added together to calculate total unlawful presence during a particular stay.

c. Both provisions are triggered by departure from the United States, and the bar

against reentry applies from the date of departure.

9 FAM 40.92 N2.1 INA 212(a)(9)(B)(i) Departure Prior to Commencement of Proceedings Required

(CT:VISA-1385; 12-11-2009)

The three-year bar of subsection INA 212(a)(9)(B)(i)(l) applies only to aliens who left the United States voluntarily before the DHS commenced proceedings against them. If the alien was unlawfully present for a period of more than 180 days and less than a year but deportation proceedings had begun before the alien's departure, he or she would not be inadmissible under the three-year bar of INA 212(a)(9)(B)(i)(I). However, such an alien might well become inadmissible under INA 212(a)(9)(A), if removed. In addition, such an alien might become inadmissible under INA 212(a)(6)(B) for failure to attend a hearing unless the alien had made an appropriate arrangement in that regard before departing.

9 FAM 40.92 N2.2 INA 212(a)(9)(B)(i)(II) Departure At Any Time

(CT:VISA-1954; 02-04-2013)

The 10-year bar under INA 212(a)(9)(B)(i)(II) does not contain the same language as the three-year bar under INA 212(a)(9)(i)(I) relating to the alien having departed voluntarily prior to commencement of removal proceedings. Thus, an alien who departs the United States after having been unlawfully present for a period of one year or more subsequent to April 1, 1997, is barred from returning to the United States for 10 years, whether the departure was before, during, or after removal proceedings and whether the alien departed on his or her own initiative or under removal order. The one exception to this rule (see also INA 212(a((9)(B)(v)) is that an alien cannot become inadmissible under INA 212(a)(9)(B)(i)(II) solely by virtue of a departure and return to the United States undertaken pursuant to a valid grant of advance parole based on the alien's pending application for adjustment of status. Note that this does not preclude a trip under a grant of advance parole from being considered a "departure" for any other purposes under the INA, nor does it call into question the applicability of any other inadmissibility ground. On the contrary, it is well settled that an alien who leaves the United States and returns under a grant of advance parole is subject to those grounds of inadmissibility that may apply, rather than grounds of deportability, once parole is terminated. (See Matter of Arrabally and Yerrabelly, 25 I&N Dec. 771 (BIA 2012.)

9 FAM 40.92 N3 ASYLEE EXCEPTION TO INADMISSIBILITY UNDER INA 212(A)(9)(B) REQUIRES BONA FIDE APPLICATION

(CT:VISA-1741; 10-13-2011)

INA 212(a)(9)(B)(iii)(II) provides that no period of time in which an alien has a bona fide application for asylum pending should be taken into account when calculating the period of unlawful presence, unless during such period the alien was employed in the United States without authorization. The Department of Homeland Security (DHS) has determined that an application for asylum that has an arguable basis in law or fact, and is not frivolous, whether or not approvable, is a bona fide application for purposes of the exception set forth in INA 212(a)(9)(B)(iii).

9 FAM 40.92 N3.1 Confirming Bona fide Application for Asylum

(CT:VISA-1741; 10-13-2011)

a. If a visa applicant who would otherwise be inadmissible for a visa under INA 212(a)(9)(B) claims the benefit of the bona fide asylum exception, you should first determine whether the alien engaged in unauthorized employment while the asylum claim was pending, and if any part of such employment occurred on or after April 1, 1997. (See 9 FAM 40.92 N3.2 below.) If so, the alien would not be eligible for the bona fide asylum exception, and he or she should, therefore, be refused under INA 212(a)(9)(B). If not, it will then be necessary to determine whether the asylum claim was "bona fide." To do so, you should cable a request to the DHS/USCIS Asylum Division Headquarters Office of Asylum ("RUEAHLA/HQ CIS IAO Washington DC"), copy to the Post Liaison Division (CA/VO/F/P), to confirm the bona fides of such application. Posts should classify such cables "SBU-NOFORN". You may not take the fact that the alien has received advance parole back into the United States to pursue the asylum application as proof that DHS has already made a determination that asylum claim is "bona fide."

b. Your request for confirmation should provide the DHS Asylum Office with a short, simple statement of the basic facts and should, at a minimum, include the following information:

   (1) The alien's complete name, date of birth, and "A" number (DHS file number);

   (2) When and where the alien lived in the United States;

   (3) When and where the alien filed the asylum application;

   (4) Whether the alien worked in the United States;

(5) If the alien worked in the United States, whether DHS had authorized such employment and, if so, what type of authorization documents the alien had been given;

c. You may presume the application to have been bona fide if the post receives no report from the "HQDHS for Asylum Office" within 60 days from the date of the referral.

9 FAM 40.92 N3.2 Work Without Authorization After April 1, 1997, Bars Use of Asylee Exception

(CT:VISA-1741; 10-13-2011)

a. Under INA 212(a)(9)(B)(iii)(II), an alien is entitled to the exception for bona fide asylum applicants only if the alien has not worked without authorization while such application is/was pending. Because INA 212(a)(9)(B) only went into effect on April 1, 1997, however unauthorized employment prior to that date should not count against the alien. Therefore, only unauthorized employment occurring on or after April 1, 1997, will disqualify the alien from being eligible for the bona fide asylum exception in INA 212(a)(9)(B)(iii)(II).

b. Prior to seeking the DHS confirmation that the asylum application was bona fide, you should interview the applicant with particular attention to questions relating to possible unauthorized employment by the alien. If the alien has engaged in unauthorized employment, during the pendency of the asylum application, and if any portion of the unauthorized employment occurred on or after April 1, 1997, then the alien would be ineligible for the exception and no purpose would be served in submitting the case to DHS for a determination of whether the asylum claim was bona fide.

c. You should note that aliens who apply for asylum may be able to obtain work authorization from DHS if their application is pending for more than 180 days even if they are not in a status that would normally allow employment. In such cases, the alien will receive an "employment authorization document" (EAD) from DHS. Posts should, therefore, examine the facts carefully before concluding that a particular employment was not authorized. In some cases, the determination of whether the alien's employment was authorized will be determined on whether it can be verified that the alien in fact filed an asylum claim. Such cases must necessarily be submitted to DHS.

9 FAM 40.92 N4 OTHER EXCEPTIONS

9 FAM 40.92 N4.1 Minors

(CT:VISA-1741; 10-13-2011)

Any period of time that an alien spends unlawfully in the United States while under the age of 18 would not count toward calculating the accrual of unlawful presence for purposes of INA 212(a)(9)(B).

9 FAM 40.92 N4.2 Family Unity

(CT:VISA-1385; 12-11-2009)

This provision stems from Section 301 of the Immigration Act of 1990 (IMMACT 90) and relates to the spouses and children of legalized aliens who have not themselves yet become lawful permanent residents. This exception applies only if they maintain protection under that provision, which means that they must regularly apply for re-registration under it.

9 FAM 40.92 N4.3 Battered Spouses and Children

(CT:VISA-1741; 10-13-2011)

The battered spouses and children provision exception stems from the related provisions in INA 204(a)(1)(A)(iii)(I) (8 U.S.C. 1154(a)(1)(A)(iii)(I)) and INA 212(a)(6)(A)(ii) (8 U.S.C. 1182(a)(6)(A)(ii)). In this instance, a critical requirement is a direct relationship between the battering or cruelty and the violation of the terms of the alien's nonimmigrant visa. In this context, the abuse must have started before and led to the alien's accrual of unlawful presence. This requires, at a minimum, establishing the dates of arrival and termination of the authorized stay, as well as the timing of the abuse and its relationship to the continued stay beyond that date.

9 FAM 40.92 N4.4 Victims of a Severe Form of Trafficking in Persons

(CT:VISA-1741; 10-13-2011)

The victims of a severe form of trafficking in persons exception stems from INA 212(a)(9)(B)(iii)(V), which provides that INA 212(a)(9)(B)(i) should not apply to an alien who demonstrates that the severe form of trafficking (as that term is defined in 22 U.S.C. 7102) was at least one central reason for the alien's unlawful presence in the United States.

9 FAM 40.92 N5 "TOLLING" FOR GOOD CAUSE

(CT:VISA-1741; 10-13-2011)

a. Subparagraph (iv) of INA 212(a)(9)(B) provides for "tolling" for up to 120 days

of a possible period of unlawful presence during the pendency of an application to change or extend NIV status. This subparagraph applies only to possible inadmissibility under subsection INA 212(a)(9)(B)(i)(I). The tolling is only permitted if the alien is lawfully admitted to or paroled into the United States, has filed a nonfrivolous application for a change or extension of status prior to the date of expiration of the authorized period of stay, and has not been employed without authorization in the United States before or during the pendency of such application.

b. DHS has inferred that the "120 days" limitation was probably predicated on an assumption that they would be able to adjudicate the application within that time frame. Due to DHS backlogs, however, some cases have been pending as long as six months or more, during which the applicants could incur the three or 10-year penalties through no fault of their own if only the first 120 days were tolled and the application was ultimately denied. Therefore, for all cases involving potential inadmissibility under INA 212(a)(9)(B) whether under the three-year bar of 212(a)(9)(B)(i)(I) or the 10-year bar of INA 212(a)(9)(B)(i)(II), DHS has decided to consider all time during which an application for extension of stay (EOS) or change of nonimmigrant status (COS) is pending to be a period of stay authorized by the Secretary of Homeland Security provided:

   (1) The application was filed in a timely manner; i.e., before the expiration date of the Form I-94, Arrival and Departure Record;

   (2) The application was "nonfrivolous"; and

   (3) The alien has not engaged in unauthorized employment (whether before or after April 1, 1997).

   NOTE: Although INA 212(a)(9)(B) did not go into effect until April 1, 1997, and the law is not retroactive, unauthorized employment prior to April 1, 1997, will render an alien ineligible for the nonfrivolous COS and/or EOS exception because aliens who have engaged in unauthorized employment are generally not eligible for change or extension of nonimmigrant stay, and therefore, an application under such circumstances should generally be considered frivolous.

c. To be considered "nonfrivolous" the application must have an arguable basis in law and fact and must not have been filed for an improper purpose (e.g., as a groundless excuse for the applicant to remain in activities incompatible with his or her status). It is not necessary to determine that the DHS would have approved the application for it to be considered nonfrivolous.

9 FAM 40.92 N6 WAIVERS

(CT:VISA-1741; 10-13-2011)

a. Nonimmigrants who are inadmissible under INA 212(a)(9)(B) may apply for an INA 212(d)(3)(A) waiver. (See 9 FAM 40.301.)

b. An immigrant visa (IV) applicant who is inadmissible for a visa under INA 212(a)(9)(B) may not apply for a waiver unless he or she is the spouse or son or daughter of a U.S. citizen or lawful permanent resident (LPR). A waiver under INA 212(a)(9)(B)(v) will be granted in such a case only if the applicant can establish that denial of his or her admission would result in extreme hardship for the U.S. citizen or LPR.

9 FAM 40.92 N7 I-601A PROVISIONAL WAIVERS OF UNLAWFUL PRESENCE

(CT:VISA-2007; 07-05-2013)

Certain immediate relatives of U.S. citizens unlawfully present in the United States who would be found ineligible for an immigrant visa (IV) by a consular officer at the time of their IV interview solely under INA 212(a)(9)(B) may apply for and receive a provisional unlawful presence waiver of this ineligibility prior to leaving the United States for their immigrant visa interview. Applicants seeking a provisional waiver must file a Form I-601A provisional unlawful presence waiver application with U.S. Citizenship and Immigration Services (USCIS). Previously, these individuals who are ineligible to adjust status in the United States were required to depart the United States and be found ineligible for an IV by a consular officer before applying for an I-601 waiver of the visa ineligibility. Under the provisional waiver process, if USCIS has reason to believe the applicant may be subject to any other grounds of ineligibility at the time of the IV interview, USCIS will find the applicant ineligible for the I-601A provisional unlawful presence waiver. An applicant also is unable to benefit from an approved Form I-601A if a consular officer identifies any other ground(s) of ineligibility during the visa interview.

9 FAM 40.92 N7.1 Eligibility for the I-601A Provisional Unlawful Presence Waiver

(CT:VISA-2007; 07-05-2013)

a. To file for the Form I-601A provisional unlawful presence waiver with USCIS, an individual must meet the following criteria:

(1) Be physically present in the United States at the time of filing and appear for biometrics collection at a USCIS Application Support Center;

(2) Be at least 17 years of age at the time of filing;

(3) Be the beneficiary of an approved Form I-130, Petition for Alien Relative, or Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, classifying him or her as an immediate relative (spouse, child, or parent) of a U.S. citizen (Form I-129F fiancé(e) beneficiaries are not eligible to file Form I-601A);

(4) Have a pending immigrant visa case based on the approved immediate relative petition for which they have paid the IV processing fee (as evidenced by a receipt from the National Visa Center (NVC));

(5) Be, or will be at the time of the IV interview, ineligible under INA 212(a)(9)(B)(i)(I) or INA 212(a)(9)(B)(i)(II);

(6) Will depart from the United States to obtain the immediate relative immigrant visa;

(7) Have a U.S. citizen spouse or parent who would experience extreme hardship if the Department of Homeland Security refused to admit the IV applicant to the United States and otherwise merit favorable exercise of discretion for a provisional waiver in accordance with INA 212(a)(9)(B)(v); and

(8) Meet all other requirements for the provisional unlawful presence waiver as stated in 8 CFR 212.7(e), and the Form I-601A and its instructions.

b. An alien is ineligible for a provisional unlawful presence waiver if:

(1) USCIS has reason to believe the applicant may be subject to grounds of ineligibility other than under INA 212(a)(9)(B)(i)(I) or INA 212(a)(B)(i)(II) at the time of the IV interview;

(2) If the Department initially acted before January 3, 2013, the date of the final rule publication, to schedule the applicant's IV interview for the approved immediate relative petition on which the Form I-601A filing is based. The date of NVC's appointment notification letter – not the appointment date of the IV interview – should be used in determining whether an applicant is ineligible for a provisional unlawful presence waiver. Applicants for whom the NVC or post scheduled an IV interview before the final rule's publication date (i.e., January 3, 2013) are ineligible for the waiver even if the interview is cancelled or rescheduled by either the applicant or the Department, and regardless of whether the applicant failed to appear for the IV appointment; or

(3) The applicant is otherwise is ineligible in accordance with 8 CFR 212.7(e), or the Form I-601A and its instructions.

9 FAM 40.92 N7.2 USCIS Processing and NVC Scheduling of I-601A Provisional Unlawful Presence Waiver Cases

(CT:VISA-2007; 07-05-2013)

a. Those interested in applying for the provisional unlawful presence waiver must submit the Form I-601A directly to USCIS, which will use the Consular Consolidated Database (CCD) to confirm that under the current petition, the Department did not act to schedule the applicant for an IV appointment before

January 3, 2013. USCIS will immediately deny the I-601A of any applicant that the Department took action to schedule before this date even if the applicant rescheduled or failed to appear for the appointment.

b. *Upon receipt of an I-601A application, USCIS will notify NVC that an applicant has applied for an I-601A provisional unlawful presence waiver. NVC will notify the applicant that it will not schedule the case for an IV appointment until USCIS notifies NVC of its adjudication decision. Once USCIS notifies the applicant and NVC of its decision, NVC will schedule the case of any documentarily-qualified applicant for an IV appointment, notify the applicant of the appointment date, and forward the case to post for processing. In the IV case file sent to post, NVC will include a post supplement report with information confirming whether USCIS processed an I-601A for the applicant and whether USCIS approved or denied the provisional unlawful presence waiver. IV case files will not include a stand-alone I-601A approval or denial document. NVC will also record the USCIS decision as a case note for the consular officer to see in the CCD's IVIS Beneficiary Report and posts may use the USCIS receipt number to verify the I-601A decision in CLAIMS via the DHS Person Centric Query System (PCQS) under Other Agencies/Bureaus in CCD.*

9 FAM 40.92 N7.3 Validity of Approved I-601A Provisional Unlawful Presence Waivers

(CT:VISA-2007; 07-05-2013)

An approved I-601A provisionally waives either the INA 212(a)(9)(B)(i)(I) or the INA 212(a)(9)(B)(i)(II) ineligibility based on the ineligibility finding of unlawful presence made by the consular officer. A provisional unlawful presence waiver takes effect once the consular officer determines that the immigrant is otherwise eligible for the visa in light of the approved I-601A. Once the provisional unlawful presence waiver takes effect, the ineligibility is permanently waived. If a case requires a Security Advisory Opinion or any other advisory opinion or review of visa ineligibility, the I-601A remains valid until such a time as the Department or consular officer makes a formal finding of a non-INA 212(a)(9)(B)(i) ineligibility.

9 FAM 40.92 N7.4 Revocation of Approved I-601A Provisional Unlawful Presence Waivers

(CT:VISA-2007; 07-05-2013)

a. *The approved provisional unlawful presence waiver is revoked automatically if:*

   (1) *A consular officer determines that the applicant is ineligible to receive an IV under any section of INA 212(a) other than INA 212(a)(9)(B)(i)(I) or INA 212(a)(9)(B)(i)(II); or*

   (2) *The immigrant visa petition approval associated with the provisional unlawful presence waiver is at the time of the interview revoked,*

withdrawn, or rendered invalid but not otherwise reinstated for humanitarian reasons or converted to a widow or widower petition; or

(3) The immigrant visa registration is terminated and has not been reinstated in accordance with INA 203(g); or

(4) The applicant, at any time before or after approval of the provisional unlawful presence waiver or before issuance of the IV, reenters or attempts to reenter the United States without being inspected and admitted or paroled.

b. If a consular officer determines that the provisional unlawful presence waiver is revoked, the consular officer should enter "I-601A revoked" into the case notes, explain why the provisional unlawful presence waiver is revoked, and then refuse the applicant on all appropriate grounds that exist (including unlawful presence using the code "9B1" or "9B2" in IVO). If the petition remains valid after the I-601A is revoked, the applicant may file an I-601, Application for Waiver of Grounds of Inadmissibility, using existing procedures for all ineligibilities with USCIS.

c. Consular officers should always carefully review the basis for any ineligibility finding, and if unsure as to whether the legal standard is met, submit an advisory opinion to VO/L/A or Security Advisory Opinion to VO/L/C for confirmation. Even findings of ineligibility on medical grounds or for public charge under INA 212(a)(1) and INA 212(a)(4) respectively would trigger automatic revocation of the I-601A and require an applicant to file an I-601. An applicant's failure to terminate or have his or her removal proceedings dismissed after I-601A approval but before departing the United States would also result in an ineligibility under INA section 212(a)(9)(A). Posts with a question regarding a specific I-601A decision should contact NVC, which will liaise with USCIS. Please remember, however, that only USCIS has authority to adjudicate the I-601A provisional unlawful presence waiver application and determine whether the grounds for extreme hardship submitted as justification for I-601A approval merit favorable exercise of discretion by USCIS.

9 FAM 40.92 N7.5 Processing Visas for Applicants with Approved I-601A Provisional Unlawful Presence Waivers

(CT:VISA-2007; 07-05-2013)

a. The provisional unlawful presence waiver process allows a consular officer to issue an IV to an applicant with an approved I-601A who is otherwise qualified for the IV and has no other ineligibilities. Prior to issuing the visa, consular officers must confirm and note the I-601A approval. For legal, accountability, and tracking purposes, a consular officer must make a formal finding of ineligibility and refuse an approved I-601A applicant in IVO using the 9B1W refusal code for applicants ineligible under INA 212(a)(9)(B)(i)(I) and the 9B2W

refusal code for applicants ineligible under INA 212(a)(9)(B)(i)(II). These codes may be used ONLY for cases with an approved I-601A for which no other ineligibility exists. After refusing the approved I-601A applicant using the appropriate 9B1W or 9B2W refusal code, the consular officer may immediately proceed to print authorize the case by waiving the refusal in IVO.

b. *Consular officers should not send a CLOK Deletion request to have the 9B1W or 9B2W hits removed. Both hits will expire in CLASS after one month and will not replicate to CBP's TECS system. U.S. Customs and Border Protection therefore will not see the hits at the port of entry when the applicant seeks admission to the United States as an immigrant. Because USCIS will notify NVC electronically of its I-601A decisions, posts do not have to include information regarding the I-601A approval in the applicant's IV packet. Posts must, however, annotate the visa to read "Waiver Section 212(a)(9)(B)(v)," which will inform the CBP inspector at the port of entry of the waiver approval. CBP will also be able to access the waiver information in the CCD and CLAIMS if necessary.*

9 FAM 40.92 N7.6 Processing Visas for Applicants with Denied I-601A Provisional Unlawful Presence Waivers

(CT:VISA-2007; 07-05-2013)

Those denied an I-601A may not appeal the USCIS decision, but may file a new I-601A. If the applicant chooses not to submit a new I-601A to USCIS, the applicant must leave the United States to appear for his or her IV interview and submit a Form I-601, Application for Waiver of Grounds of Inadmissibility, to USCIS after a consular officer has found the applicant ineligible for a visa under INA 212(a).